IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1093

THEODORE R. WATSON, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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CITATIONS

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The Petitioner, Theodore R. Watson, respectfully prays that a *writ of certiorari* issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above entitled case on December 4, 1975.

OPINIONS BELOW

Following a prior mistrial on June 13, 1974, Theodore R. Watson was convicted by a jury verdict on October 7, 1974, and sentenced on November 26, 1974. Judgment was entered on November 26, 1974.

The United States Court of Appeals for the District of Columbia Circuit rendered judgment affirming the

conviction without written opinion (Appendix A, attached). Judgment was filed on December 4, 1975. The time within which to file this petition was extended by this Honorable Court to and including February 2, 1976.

JURISDICTION

The Judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on December 4, 1975. Jurisdiction is conferred upon this Honorable Court pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

I. Whether the prosecutor's reference to the former co-defendant's failure to testify would, in the circumstances presented, naturally and necessarily be taken by the jury as a thinly veiled comment on the accused petitioner's failure to testify, in violation of the Fifth Amendment to the Constitution of the United States, 18 U.S.C. § 3481 (1970), and the supervisory powers of this Honorable Court over the conduct of the federal courts.

II. Whether the prosecutor's repeated misstatements and otherwise improper argument and rebuttal argument, in the absence of appropriate curative instructions, denied petitioner a fair trial in violation of the supervisory powers of this Honorable Court over the conduct of the federal courts, and in violation of the Due Process Clause of the Fifth Amendment to the Constitution of the United States.

STATUTES INVOLVED

The statutes involved are 21 U.S.C. § 841(a)(1) (1970), Possession of a controlled substance with intent to distribute, 18 U.S.C. § 3481 (1970), Competency

of the accused, and 28 U.S.C. § 2106 (1970), Determinations by the Supreme Court. (Appendix B, attached.)

STATEMENT OF THE CASE

In the United States District Court for the District of Columbia, pursuant to jurisdiction conferred by 18 U.S.C. § 3231 (1970), petitioner Theodore R. Watson was convicted of one count charging a violation of 21 U.S.C. § 841(a)(1) (1970), unlawful possession of a controlled substance (heroin) with the intent to distribute it. The count alleged that the violation had occurred on September 8, 1973.

Mr. Watson and a co-defendant, Larry E. Holman, had originally gone to trial on June 13, 1974, but a mistrial was declared during the Government's opening statement because the prosecutor improperly referred to an alleged aborted attempt to purchase narcotics from the defendants. Mr. Holman's case was subsequently disposed of by a guilty plea to one count prior to Mr. Watson's October 1974 trial which is the subject of this petition.

Mr. Watson was brought to trial on a five count indictment charging two counts of unlawful distribution of heroin, 21 U.S.C. § 841(a)(1) (1970), two counts of unlawful possession of heroin with intent to distribute it, 21 U.S.C. § 841(a)(1) (1970), and one count of possession of cocaine, 33 D.C.Code § 402 (1973). The trial lasted from October 2 through October 7, 1974. At the close of the Government's case the trial court granted a motion for Judgment of Acquittal as to three counts of the indictment. Mr. Watson was convicted of one of the remaining two counts, possession of heroin on September 8, 1973, with the intent to distribute the heroin.

The importance of the role played by the co-defendant, Mr. Holman, was underscored at the start of the trial when the trial judge expressly warned the jury not to give any consideration to the fact that "that other person is not sitting here on trial at this time." (Court Reporter's Transcript, hereinafter TR, at 10.) Through the intervention of a named informant who was not permitted to testify, Drug Enforcement Administration Special Agent Charles Story made telephone contact with Mr. Holman, arranging for a meeting. (TR 67, 68, 92, 93, 96.) Agent Story and the informant went to Mr. Holman's apartment on September 8, 1973, where they were invited in by Mr. Holman (TR 71, 94) and were observed to enter the apartment by Special Agent Clinton Perry who then waited outside of the highrise apartment building. (TR 111, 113, 140-142.)

Agent Story testified that he was then introduced for the first time to the petitioner who was called Ted and who was seated at a dinette table. Agent Story stated that Mr. Watson was later identified as Theodore Watson through police photographs. When defense counsel asked for a mistrial, the trial judge conceded that the jury might infer guilt from the fact that the police had photographs of Mr. Watson, but the motion for a mistrial was denied. (TR 109, 110.) All four men—Holman, Story, Watson, and the informant—had a general conversation about narcotics (TR 72.), and Mr. Watson was observed removing a light brown powder from a cutting board on the table and wrapping small quantities of the light brown powder in tin foil. (TR 73.) A clear plastic bag of dark brown powder was also on the table and Mr. Holman picked it up for Agent Story and the informant to examine. (TR 73, 96, 97.)

In response to Agent Story's direct request Mr. Holman stated that the cost of an ounce of the dark brown powder would be $3,000. (TR 73, 74.) Mr. Holman shorty agreed to a price of $1,500 for a half ounce. (TR 74, 96.) And when Agent Story questioned the purity of the powder the informant stated that he knew Mr. Holman and that Mr. Holman could be trusted. (TR 74.)

Mr. Watson then ground several spoonfuls of the dark brown powder in a coffee grinder for several seconds and Mr. Holman sniffed the ground powder and murmured approval. (TR 75.) Mr. Watson then sifted the ground powder through a tea strainer and placed a measured portion in a piece of tin foil which was rolled up. (TR 75.) At Agent Story's request Mr. Watson then mixed a minute additional portion of the dark brown powder with a white powder and wrapped it in tin foil. Mr. Watson did not ask for any money in addition to the $1,500 Mr. Holman had already requested from Agent Story for the half ounce of dark brown powder (TR 76.)

Meanwhile, Mr. Holman and the informant left the room and Agent Story counted out the $1,500 which Mr. Holman had demanded. Mr. Watson counted the money and laid it to the side (TR 77, 78).

When Agent Story and the informant stated that only Agent Story would be coming next time, it was Mr. Holman who stated that that was acceptable (TR 79, 97). Agent Story then quoted Mr. Holman as stating that "he" [Mr. Holman] would like Story and the informant to get out so that "his" [Mr. Holman's] customers could start coming over. And Agent Story then quoted Mr. Watson as stating that "He [Mr.

Holman] has hardly had time to buy groceries or pay his bills because his [Mr. Holman's] customers wanted to come over all the time . . . . " (TR 79.)

Agent Story and the informant left and Agent Perry observed Mr. Watson leave the building without any packages a short time later, noting that Mr. Watson got into a Cadillac which was found to be registered in his name. (TR 113, 114, 138, 139.) Although the jury was later instructed to disregard any testimony concerning events of October 9, 1973, which concerned the counts of which the trial judge acquitted Mr. Watson, there had been testimony that Mr. Watson was observed on that date driving another Cadillac not registered in his name. (TR 139.)

At no time during the trial was there any testimony that any narcotics or instruments that might be used in the processing of narcotics were observed in Mr. Watson's car, on his person or anywhere other than in Mr. Holman's apartment. And at no time was Mr. Watson referred to in the drug agents' reports, even though he had been identified through his automobile registration when he left the apartment building on September 8, 1973. (TR 102, 150.)

Defense counsel motioned for Judgment of Acquittal at the close of the Government's case and the motion was granted as to all counts but the two referring to September 8, 1973. (TR 208, 209, 232, 233.)

During the defense opening argument following the Government's case in chief and the granting of the defense motion for Judgment of Acquittal with respect to all counts except those two concerning the transaction of September 8, 1973, counsel for the defendant stated that he intended to call Mr. Holman as a defense witness. Mr. Holman had earlier indicated a

willingness to testify. (TR 242, 243, 251.) But before he was called, Mr. Holman was *voir dired* and stated that, upon advice of counsel, he intended to assert his Fifth Amendment privilege not to answer any questions that might be put to him on the ground that he might incriminate himself by answering. Defense counsel then determined not to call Mr. Holman as a witness. (TR 320-324.)

Furthermore, another agent of the Drug Enforcement Administration, Morris H. Davis, testified as an expert concerning the use, for diluting narcotics, of certain paraphernalia seized on October 9, 1973, as well as the relative values of various quantities of narcotics. (TR 174, 175.) The testimony with respect to the use of the paraphernalia, as well as the paraphernalia itself, was stricken from the record when Mr. Watson was granted Judgment of Acquittal from the three counts concerning October 9, 1973. (TR 240-242.)

At the close of all the evidence defense counsel again motioned for Judgment of Acquittal, but the motion was denied. (TR 347.)

During the Government's closing argument the Assistant United States Attorney referred to that expert's testimony and "what the use of certain items were that Theodore Watson was using that evening in order to cut the narcotics . . . ." Defense counsel specifically objected to this reference, but to no avail. (TR 353-363.)

During the Government's rebuttal argument the prosecutor misstated that "Mr. Watson had a couple of very, very expensive cars . . . at that time." (TR 363, 364.) He also misstated that both Mr. Holman and Mr. Watson, rather than only Mr. Holman, wanted

to hurry Agent Story and the informant out of the apartment and he distortedly suggested that both defendants referred to the customers as "their" customers or as "our" customers. (TR 364.)

The prosecutor also emphasized that Agent Perry had been to Mr. Holman's apartment on an additional occasion. (TR 365.) This was a reference to an aborted sale on a third date which the trial judge on several occasions expressly cautioned the prosecutor not to refer to (TR 346) and which was the subject of the earlier mistrial. Even the prosecutor appears to have recognized his error. (TR 365.)

Perhaps most significantly, the prosecutor argued that Mr. Watson "had some of these narcotics right in front of him and those narcotics . . . were right under Mr. Holman's nose, and Mr. Holman is not here to contest it." (TR 364.) This reference was in flagrant violation of the judge's warnings that Mr. Holman's absence was not to be mentioned or considered. (TR 10.) Furthermore, it is in reality a thinly veiled reference to the petitioner's failure to testify since Mr. Holman was not on trial and therefore had no reason to contest the fact that narcotics were under his [Mr. Holman's] nose.

Defense counsel made timely objection (TR 353-362) to all of the foregoing improper remarks except those concerning the customers and Mr. Holman's absence, and even asked for a mistrial because of the statements about the automobiles and Agent Perry's earlier visits, but to no avail. (TR 368.) The only curative action provided by the trial judge was a rather confusing passage concerning Agent Davis' testimony haphazardly inserted in the midst of lengthy, perhaps confusing instructions. (TR 387.)

The jury acquitted Mr. Watson of distributing heroin, but found him guilty on one count of possession of heroin with the intent to distribute it.

Timely appeal was taken to the United States Court of Appeals for the District of Columbia Circuit pursuant to 28 U.S.C. § 1291. The judgment was affirmed without opinion on December 4, 1975. An application for extension of time within which to petition for a *writ of certiorari* was granted by this Honorable Court extending the time in which to file this petition to and including February 2, 1976.

ARGUMENT

I. The Prosecutor's Reference to the Former Co-Defendant's Failure To Testify Would, in the Circumstances Presented, Naturally and Necessarily Be Taken by the Jury as a Thinly Veiled Comment on the Accused's Failure To Testify in Violation of the Fifth Amendment to the Constitution of the United States, 18 U.S.C. § 3481 (1970), and the Supervisory Powers of This Honorable Court Over the Conduct of the Federal Courts.

During the Government's rebuttal argument the prosecutor argued that the petitioner "had some of these narcotics right in front of him and those narcotics, ladies and gentlemen, were right under Mr. Holman's nose, and Mr. Holman is not here to contest it." (TR 364.)

In the circumstances of this case the jury would naturally and necessarily take the remark to be a comment on the failure of the petitioner to testify, see *United States* v. *Williams*, 521 F.2d 950, 953 (D.C. Cir. 1975); *United States* v. *Mahanna*, 461 F.2d 1110, 1114, 1115 (8th Cir. 1972); *Davis* v. *United States*, 357 F.2d 438, 441 (5th Cir. 1966), *cert. denied*, 385 U.S. 927 (1966); *United States ex rel. D'Ambrosio* v. *Fay*,

349 F.2d 957, 960-61 (2d Cir. 1965), *cert. denied,* 382 U.S. 921 (1965), *Knowles* v. *United States,* 224 F.2d 168, 170 (10th Cir. 1955), in flagrant violation of an accused's right not to testify. *Griffin* v. *California,* 380 U.S. 609 (1965), *rehearing denied,* 381 U.S. 957 (1965); *Chapman* v. *California,* 386 U.S. 18 (1967), *rehearing denied,* 386 U.S. 987 (1967); 18 U.S.C. § 3481 (1970); see *Wilson* v. *United States,* 149 U.S. 60 (1893). See *Donnelly* v. *De Christoforo,* 416 U.S. 637 (1974).

The Government's evidence pointed to Mr. Holman, the prior co-defendant, as the perpetrator of the crime, not Mr. Watson: the crime occurred in Mr. Holman's apartment; the contact was made with Mr. Holman; Mr. Holman welcomed the Government agent and invited him into the apartment; Mr. Holman set the price; Mr. Holman approved the quality of the heroin Mr. Holman approved a future visit by the agent alone; Mr. Holman was the one the informant trusted; Mr. Holman was the one who showed the agent to the door; the customers were referred to as Mr. Holman's.

But Mr. Holman was not on trial, and even if he had been called as a witness he would have had no interest "to contest it" [the existence of the narcotics under either Mr. Holman's or Mr. Watson's nose]. Only Mr. Watson would have had such an interest. And the prosecutor knew that the petitioner was the only one who could "contest it", since the prosecutor, unlike the jury, was aware that Mr. Holman had refused to testify, asserting his constitutional privilege. *Rodriguez-Sandoval* v. *United States,* 409 F.2d 529, 531 (1st Cir. 1969), *cert. denied,* 414 U.S. 869 (1973); *Desmond* v. *United States,* 345 F.2d 225 (1st Cir. 1965); *Barnes*

v. *United States,* 8 F.2d 832 (8th Cir. 1925); *Linden* v. *United States,* 296 F. 104 (3d Cir. 1924).

At the very least, a cautionary instruction was required. *United States ex rel. D'Ambrosio* v. *Fay, supra, at* 349 F.2d 961.

Even though this argument was not made below, the effect of the prosecutor's statement is plain, substantial, prejudicial and constitutional error, *Chapman* v. *California, supra; Fahy* v. *Connecticut,* 375 U.S. 85 (1963); 28 U.S.C. § 2106 (1970); Rule 52(b), Federal Rules of Criminal Procedure, and this Honorable Court may take notice and remedy the error. *O'Connor* v. *Ohio,* 385 U.S. 92 (1966); *Silber* v. *United States,* 370 U.S. 717 (1962); *United Brotherhood of Carpenters and Joiners of America* v. *United States,* 330 U.S. 395 (1947); *Brasfield* v. *United States,* 272 U.S. 448 (1926); *Wiborg* v. *United States,* 163 U.S. 632 (1896). Also, *United States* v. *Atkinson,* 297 U.S. 157 (1936). It cannot be said with assurance that the jury was not substantially swayed. *Kotteakos* v. *United States,* 328 U.S. 750, 765, (1946).

II. The Prosecutor's Repeated Misstatements and Otherwise Improper Argument and Rebuttal Argument, in the Absence of Appropriate Curative Instructions, Denied Petitioner a Fair Trial in Violation of the Supervisory Powers Over the Federal Courts and in Violation of the Due Process Clause of the Fifth Amendment to the Constitution of the United States.

This Court has the supervisory power to review the conduct of counsel to assure that such conduct is not "of such a character as not only to defeat the rights of litigants but it may directly affect the administration of public justice." *McDonald and United States Fidelity And Guaranty Company* v. *Pless,* 238 U.S. 264, 266

(1915); also *McNabb, et al.* v. *United States*, 318 U.S. 332, 340, 341 (1943); *Griffin, et al.* v. *Thompson*, 2 How. (43 U.S.) 244, 257 (1844). This supervision extends to the conduct of a federal prosecutor whose duty "in a criminal prosecution is not that . . . [he] shall win a case, but that justice shall be done." *Berger* v. *United States*, 295 U.S. 78, 88 (1935). And the result may be such fundamental unfairness that due process is denied, although the unfairness need not reach constitutional levels to warrant remedial action in federal criminal trials.

Where the case against the accused is weak, prejudice to the accused is highly probable. *Berger, supra,* at 89. Where the inferences to be drawn and the legal determinations to be reached by the jury are difficult, the likelihood of prejudice is similarly great, and, at the very least, a cautionary instruction is necessary. Such is the situation presented.

The Government's key witness, Drug Enforcement Administration Special Agent Charles Story pointed almost exclusively to Mr. Watson's co-defendant, Larry E. Holman, as the perpetrator of the crime. The contact for the "buy" was made with Mr. Holman, and Mr. Watson's name was never mentioned by the parties or even contemplated by the Government narcotics agents. The transaction occurred in Mr. Holman's apartment where Mr. Watson was a mere visitor. The narcotics agent and the named informant were invited in by Mr. Holman. Mr. Holman quoted the cost to the agent. And it was Mr. Holman who agreed to the amount of the ultimate purchase and its cost. It was Mr. Holman who lifted the bag of narcotics for Agent Story's inspection. When Agent Story questioned the purity of the narcotics the informant accompanying Agent Story indicated his trust in Mr. Holman, never mentioning Mr. Watson. It was Mr. Holman who indicated approval of the portion of powder ground in the electric mixer. And Mr. Holman approved Agent Story's intention to return without the informant at some time in the future. Agent Story quoted Mr. Holman as stating that "he" [Mr. Holman] would like Mr. Story and the informant to leave so that "his" [Mr. Holman's] customers could start coming. Agent Story then quoted Mr. Watson as stating that "He [Mr. Holman] has hardly had time to buy groceries or pay his bills because his [Mr. Holman's] customers wanted to come over all the time . . . ." (TR 79.)

Mr. Watson was never observed carrying any packages—narcotics, narcotics paraphernalia, or otherwise—into or out of the building, and none were ever found on his person or in his automobile, although Government agents surveilled him closely.

When Agent Story handed the money to Mr. Watson the latter placed it on the table and to the side, never retaining possession of it.

Surely, repeated abuses of prosecutorial conduct in these circumstances, aggravated by the refusal of the trial judge to give curative instructions, were likely to have prejudiced the jury's deliberations and achieved the same impermissible result as a single flagrant comment.

The prosecutor twice misstated the facts. He implied that Mr. Watson owned both Cadillacs in which he was observed, although his ownership of only one was established. Defense counsel unsuccessfully sought a mistrial on this point. The prosecutor also subtly but significantly distorted Agent Story's testimony that all

references to customers referred to them only as Mr. Holman's customers and not those of Mr. Watson.

Three times the prosecutor called attention to matters to which the trial judge had expressly warned him not to refer. The prosecutor remarked that Agent Perry had been to Mr. Holman's apartment on additional occasions, thereby referring to an aborted sale, reference to which had prompted a prior mistrial. Defense counsel unsuccessfully sought a mistrial on this point. The prosecutor also referred to the expert testimony of Agent Davis as to the illegal use to be made of certain paraphernalia, even though the trial judge had limited that testimony to its relevance to the questions of the value of the narcotics and possession by Mr. Watson. Defense counsel unsuccessfully objected to this statement. And, perhaps most significantly, the prosecutor emphasized Mr. Holman's absence at trial despite the trial judge's repeated warnings not to refer to such matters.

The cumulative effect of these numerous misstatements, distortions of fact, and otherwise improper remarks, combined with the trial judge's refusal to give curative instructions, is plain error, and it cannot be said "with assurance that the jury was not substantially swayed." *Kotteakos* v. *United States, supra,* at 765.

Even those of the prosecutor's remarks that had not been objected to at trial, viewed in the context of all the errors, present plain error. *Fahy* v. *Connecticut, supra.*

CONCLUSION

The petition for a *writ of certiorari* to the United States Court of Appeals for the District of Columbia Circuit should be granted.

Respectfully submitted,

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February 2, 1976

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1975

Criminal No. 972-73

No. 74-2125

UNITED STATES OF AMERICA
v.
THEODORE R. WATSON, *Appellant*

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Before: HASTIE,* *Senior United States Circuit Judge*, United States Court of Appeals for the Third Circuit, and ROBINSON and ROBB, *Circuit Judges*

FILED DECEMBER 4, 1975

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the Court. *See* Local Rule 13(c).

On consideration of the foregoing, the Court finding no error warranting reversal, it is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause is hereby affirmed.

Per Curiam
For the Court

/s/ HUGH E. KLINE
Hugh E. Kline
Clerk

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* Sitting by designation pursuant to 28 U.S.C. § 291(a) (1970).

APPENDIX B

Title 21

§ 841. Prohibited Acts A—Unlawful Acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance;

Title 18

§ 3481. Competency of accused

In trial of all persons charged with the commission of offenses against the United States and in all proceedings in courts martial and courts of inquiry in any State, District, Possession or Territory, the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him.

Title 28

§ 2106. Determination

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of any court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

No. 75-1093

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THEODORE R. WATSON, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
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In the Supreme Court of the United States

OCTOBER TERM, 1975

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the prosecutor's comments during closing argument denied him a fair trial.

After a jury trial in the United States District Court for the District of Columbia, petitioner was convicted of possessing heroin with intent to distribute, in violation of 21 U.S.C. 841(a)(1).[1] He was sentenced to three years' imprisonment. The court of appeals affirmed (Pet. App. A).

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[1]Petitioner and Larry Holman were initially charged in a five-count indictment alleging various narcotics offenses. Petitioner was acquitted on the four other counts, and upon Holman's plea of guilty to one count the other charges against him were dismissed prior to trial.

The evidence at trial established that on September 8, 1973, Agent Charles Story of the Drug Enforcement Administration and a government informant went to the apartment of Larry Holman in Washington, D.C., to purchase narcotics (Tr. 70-71). When they arrived, petitioner was seated at a table placing quantities of brown powder from a "cutting board" into foil packets (Tr. 71-73). The agent, the informant, and Holman sat at the table with petitioner and engaged in a general discussion of narcotics trafficking (Tr. 72). During this conversation Holman permitted the agent to examine a large plastic bag containing about nine ounces of heroin, which he offered to sell at a cost of $3,000 per ounce (Tr. 28-30, 73-74).

After the agent agreed to buy six "spoons" of the heroin for $1,500, petitioner prepared the heroin by grinding it in an electric coffee grinder, filtering it through a tea strainer, and packaging it in foil packets (Tr. 74-76). Petitioner also mixed an additional quantity of heroin with some lactose and placed that mixture in a second foil packet (Tr. 76-77). Petitioner then gave the two foil packets of heroin to the agent in exchange for $1,500. After petitioner counted the purchase money the agent left the apartment with the heroin (Tr. 77-78).

1. Petitioner asserts (Pet. 9-11) that the prosecutor improperly commented on his failure to testify when during closing argument he remarked, without objection, that petitioner had some narcotics "in front of him" which "were right under Mr. Holman's nose, and Mr. Holman is not here to contest it" (Tr. 364).[2] Petitioner

[2]Holman had indicated to the court, out of the presence of the jury, that if called to the stand he would invoke his Fifth Amendment privilege, and he was therefore not called to testify at trial (Tr. 320-323).

did not make this argument in the court of appeals and thus the issue is not properly presented for review here. *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 147 n. 2. Moreover, petitioner did not object to the prosecutor's remark at trial, and it was certainly not "plain error" under Rule 52(b), Fed. R. Crim. P., for the district court to have failed *sua sponte* to have cautioned the jury that a remark referring only to the absence of a possible defense witness should not be construed as a reference to the defendant's failure himself to testify.

2. Petitioner claims (Pet. 11-14) that the prosecutor's closing argument included various other improper comments and misrepresentations.

a. Contrary to petitioner's first assertion (Pet. 13), the prosecutor's statement that petitioner had "a couple of very, very expensive cars * * * at the time" (Tr. 363-364) was directly supported by testimony that established petitioner's use and ownership of two Cadillac automobiles at the time of the offense (Tr. 113-114, 138-139).

b. Petitioner claims (Pet. 13-14) that the prosecutor misrepresented the evidence in stating, without objection, that both Holman and petitioner wanted the agent and the informant to leave Holman's residence because they had customers arriving (Tr. 364), but this claim was not presented to the court below and accordingly is not properly raised here. *Adickes* v. *S. H. Kress & Co.*, *supra*. In any event, even if the prosecutor's comment did not precisely reflect the trial testimony, it amounted to harmless error at most, given the evidence showing that Holman and petitioner were jointly operating a narcotics distribution enterprise (Tr. 79).

c. There is no basis in the record for petitioner's claim (Pet. 14) that despite the court's contrary instruction the prosecutor directed the jury's attention to an attempted drug purchase at Holman's apartment subsequent to the transaction underlying petitioner's conviction. The prosecutor merely mentioned that the agent who purchased the heroin from petitioner had visited Holman's apartment on "several occasions," as the evidence presented at trial clearly established (Tr. 83, 105, 365); no reference was made to other narcotics sales, aborted or otherwise.

d. Finally, there is no substance to petitioner's claim (Pet. 14) that he was prejudiced by the prosecutor's brief reference to expert testimony concerning the use of the implements petitioner used to prepare and package the heroin sold to the undercover agent. Even if this reference had been improper,[3] there could have been no prejudice to petitioner under the trial court's careful instruction to the jury regarding the proper utilization of the expert's testimony (Tr. 387). In any event, this contention also was not made in the court below, and therefore it, too, is not properly presented for review in this Court.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

APRIL 1976.

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[3]While the trial court's final instructions to the jury indicated that the jury was to consider the expert's testimony only as it related to the value of the heroin sold by petitioner (Tr. 387), his ruling during trial did not specifically exclude the testimony referred to in the prosecutor's argument (Tr. 240-241).